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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MELISSA FARGO,

Plaintiff and Appellant,

v.

SALLIE MAE, INC.,

Defendant and Respondent.

2d Civil No. B233714
(Super. Ct. No. 1340272)
(Santa Barbara County)

While attending photography school, Melissa Fargo acquired five loans with a combined initial principal balance of \$74,209. Sallie Mae, Inc., a Delaware corporation, held the notes, serviced the loans, and capitalized the outstanding accrued interest. After Fargo's combined principal balance reached \$104,816, she filed a complaint against the school, its owner, and Sallie Mae. She settled with the school and its owner and filed a first amended complaint (FAC) against Sallie Mae, alleging causes of action for fraud, deceit and breach of contract. Fargo appeals the judgment of dismissal entered after the trial court sustained Sallie Mae's demurrer without leave to amend. We affirm.

BACKGROUND¹

Fargo attended the Brooks Institute of Photography (Brooks) from October 2003 through October 2005. Career Education Corporation (CEC) owns and operates Brooks. From September 19, 2003, to January 11, 2005, Fargo completed and signed five separate forms entitled "CEC Signature Loan Application and Promissory Note" (note) each of which provided that the lender or note holder could capitalize the accrued interest. Fargo received five loans with a combined initial principal balance of \$74,209. She sent payments totaling \$8,819 to Sallie Mae, the holder of the note. Sallie Mae capitalized the accrued interest. As a result Fargo's combined loan balance reached \$104,816.

On October 28, 2009, Fargo filed a complaint against Brooks, CEC, and Sallie Mae seeking restitution and rescission, as well as damages for breach of contract, fraud, negligent misrepresentation, and California Education Code violations. The complaint alleged that Sallie Mae was liable, in large part, because it was "subject to all claims which Fargo could assert against Brooks and CEC," as the holder of the notes. Fargo settled her claims against CEC and Brooks and dismissed them from this action.

On December 20, 2010, the trial court granted Fargo's motion for leave to file the FAC against Sallie Mae alleging actions for fraud, deceit and breach of contract. Sallie Mae demurred to the FAC on multiple grounds, including Fargo's failure to state specific facts sufficient to constitute a cause of action (Code Civ. Proc., § 430.10, subd. (e));² failure to identify the documents referenced in the complaint; and failure to identify the parties who committed the acts alleged in the FAC (*id.*, subd. (f)). Sallie Mae also asserted that under the circumstances of this case, the

¹We base the facts herein on the allegations of the complaint which we accept as true in reviewing its sufficiency. (See *Crowley v. Katleman* (1994) 8 Cal.4th 666, 672.)

² All statutory references are to the Code of Civil Procedure Code unless otherwise stated.

economic loss rule bars actions for misrepresentation or fraud in the performance of a contract. (See *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988.) Because it concluded that Fargo had not alleged any actionable loss in contract or tort, the trial court did not address the economic loss rule. It sustained the demurrer without leave to amend.

Relevant Note Provisions

The notes are dated September 29, 2003, December 10, 2003, May 12, 2004, May 18, 2004, and January 11, 2005. The 2003 notes are on "Copyright Sallie Mae 2000-03 (1/2003)" forms. The 2004 and 2005 notes are on "Copyright Sallie Mae 2000-04 (1/2004)" forms. The five notes have substantially identical provisions.

Generally, the loans are structured so that funds are disbursed while the borrower attends school, and repayment does not begin until the borrower's enrollment drops below a certain level. More specifically, the notes divide the life of the loan into two periods, as follows: "1. Interim Period – The 'Interim Period' will begin on the date my loan is disbursed. My Interim Period will end 6 months after I graduate or drop below half-time enrollment at an eligible school. . . . ¶ 2. Repayment Period – The 'Repayment Period' will begin on the day after the Interim Period ends and will continue up to 300 months depending on my loan balance."

Several note provisions address the capitalization of interest. The 2003 form note defines capitalized interest as follows: "4. Capitalized Interest or Fees – From time to time, interest or fees due and not yet paid may be added to the principal amount of the loan. This addition is called 'capitalizing.' Since interest accrues on the outstanding principal balance, capitalized interest and fees increase the total cost of the loan." The 2004 form note's parallel definition contains minor variations which are italicized in the following excerpt: "3. Capitalized Interest and *Other Amounts*: From time to time, interest, . . . fees, *charges* and *costs* due and not yet paid may be added, *without notice*, to the principal amount of the loan. . . . (Italics added.)

The notes provide that interest will accrue from the loan disbursement date until payment in full at the variable rate. (The notes define the variable rate.) The

notes' "Terms of Repayment" section provides in pertinent part as follows: "1. Interim Period- "I am not required to make payments during the Interim Period. *You will capitalize unpaid accrued interest at the beginning of the Repayment Period.* . . . [¶] 2. Repayment Period – I will make consecutive monthly payments during the Repayment Period in the amounts and on or before the payment due dates shown on my statements until I have paid all of the principal and interest and any other charges I may owe [¶] . . . [¶] 5. Amounts Owing at the End of the Repayment Period – Since interest accrues daily upon the unpaid principal balance of my loan, if I make payments after my payment due dates, I may owe additional principal and interest, fees and charges at the end of the Repayment Period. In such case, I shall pay the additional amounts, and you may lengthen the Repayment Period." (Italics added.)

DISCUSSION

The Trial Court Properly Sustained the Demurrer without Leave to Amend

The FAC alleges actions for fraud, deceit and breach of contract. The trial court ruled that the FAC does not state any cause of action. We agree.

We review orders sustaining a demurrer and granting judgment on the pleadings de novo, exercising our independent judgment to determine whether a cause of action has been stated under any legal theory. (*Ochs v. Pacific Care of California* (2004) 115 Cal.App.4th 782, 788.) We accept as true properly pleaded allegations of fact, but not contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 .) "The burden is on the [appellant] to demonstrate the manner in which the complaint might be amended, and the appellate court must affirm the judgment if it is correct on any theory." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459-460.)

Fraud and Deceit

The FAC alleged fraud based on misrepresentations and concealment. The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Robinson*

Helicopter Co., Inc. v. Dana Corp., *supra*, 34 Cal.4th at p. 990.) Fraud must be pleaded specifically. "[A] plaintiff must plead facts which show how, when, where, to whom, and by what means the representations were made. [Citation.] When the defendant is a corporate defendant, the plaintiff must further allege the names of the persons who made the representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written . . . [although] '[l]ess specificity is required when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy."' [Citation.]" (*Citizens of Humanity, LLC v. Costco Wholesale Corp.* (2009) 171 Cal.App.4th 1, 20 [disapproved on other grounds in *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 337].)

The elements of deceit are: "(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 131.)

The FAC failed to state a cause of action for fraud because it did not plead specific facts showing the substance of the alleged misrepresentations or the means by which they were made. (*Citizens of Humanity LLC v. Costco Wholesale Corp.*, *supra*, 171 Cal.App.4th at p. 20.) It contained general facts and conclusions such as the following: Sallie Mae "gave false and misleading information and omissions of critical information, in a pervasive pattern, to Fargo regarding the nature of the . . . Loans[,] . . . [¶] . . . used scripts prepared by [Sallie Mae] . . . , which stated what misrepresentations of fact needed to be said to Fargo with the purpose of obtaining Fargo's agreement to the loans[;] [¶] [and that] [t]he Forbearance Script used by defendants . . . states that unpaid interest will be capitalized, added to the unpaid

balance of the loan and will increase the total cost [and] . . . does not explain how the amount is calculated, what the cost of the increase is to the borrower, or the effect on the total cost of the loan." The FAC did not provide specific information regarding the alleged forbearance script, but left the trial court "in the dark as to what misrepresentations Fargo believe[d] were made to her."

In claiming that the FAC states a cause of action for deceit, Fargo argues further that the notes did not disclose the extent or the impact of capitalized interest, and seems to argue that the note and application forms should have specified a total dollar amount of interest that could be capitalized. The uncertainty about the length of time that Fargo could attend school rendered it difficult, if not impossible, to quantify that amount. Moreover, the FAC fails to allege that the lender or Sallie Mae had a specific duty to disclose the precise total dollar amount of interest that could be capitalized. Absent such a duty, the FAC lacks an essential element of the cause of action for deceit. (*Linear Technology Corp. v. Applied Materials, Inc.*, *supra*, 152 Cal.App.4th at p. 131.)

Fargo further argues that the notes failed to disclose that interest would be capitalized, because they said that interest "may" be capitalized, rather than saying it "will" be capitalized. This argument fails for two reasons. As the trial court observed, one section of the notes does state that interest "will" be capitalized. Moreover, it is of no consequence that the notes state that interest "may" be capitalized, instead of stating it "will" be capitalized, because the effect is the same. In either case, the notes disclosed that interest could be capitalized, and that doing so would increase the borrower's principal balance. We reject Fargo's similar argument regarding the uncertain length of the repayment period. She complains that the notes say that repayment "*will* continue 'up to 300 months' but they also say . . . repayment *may* be extended to an unknown date." When read in context, there is nothing misleading about the possibility that the repayment period may be extended. The notes state that where a borrower has made untimely payments which cause her to owe "additional principal and interest, fees and charges at the end of the Repayment

Period," the lender may extend the repayment period. The trial court correctly concluded that the FAC fails to state a cause of action for fraud or deceit.

Breach of Contract

To state a cause of action for breach of contract, a plaintiff must plead the contract, her performance of the contract or excuse for nonperformance, the defendant's breach and the resulting damage. (*Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 458.) The FAC complains that Sallie Mae added capitalized interest to her balance while Fargo was making timely payments on her loans. It fails to identify any specific note provision that Sallie Mae breached by capitalizing interest under that circumstance, as the trial court explained in its statement of decision. The trial court correctly ruled that the FAC failed to state a cause of action for breach of contract.

Fargo contends that the trial court erred by denying her leave to amend the FAC. She did not present a proposed written amendment to the trial court. Where a demurrer is sustained without leave to amend, this court decides whether a reasonable possibility exists that an amendment may cure the defect. If it can, we reverse; if not, we affirm. A plaintiff bears the burden of proving the reasonable possibility of amendment. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) Fargo has failed to meet that burden.

In her reply brief, Fargo proposes "to add to the breach of contract claim Sallie Mae's failure to apply her payments on the Notes, an inherent expectation of the contract terms." The brief then refers to the segment of the reported hearing on the demurrer in which Fargo's counsel stated that Sallie Mae caused Fargo to receive an adverse credit rating by posting her federal student loan payment to her private loan account. The erroneous posting of a payment to Fargo's federal loan payment did not, however, trigger the capitalization of interest on her private loans. Fargo also sought leave to amend the complaint because a Sallie Mae representative testified in deposition that it always capitalizes accrued interest, which supports Fargo's claim that the note language stating that it "may" do so is misleading. For reasons we have

already discussed, the use of may and will in that context is of no consequence.

Fargo's proposed amendments would not cure the defects in the FAC.

DISPOSITION

The judgment is affirmed. Respondent shall recover costs on appeal.

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PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Colleen K. Sterne, Judge

Superior Court County of Santa Barbara

Lewis Law Firm, Patricia Lewis, for Plaintiff and Appellant.

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